PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED JUNE 5, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	Case No. 95-O-16652
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	)	
KUOJEN FELIX WU,	)	OPINION ON REVIEW
	)	
	)	
A Member of the State Bar.	)	
	)	

In a petition for review under rule 300 of the Rules of Procedure of the State Bar,[1] the State Bar seeks review of a hearing judge's order awarding respondent Kuojen Felix Wu reimbursement for the costs he incurred in obtaining the trial transcript in seeking review in this matter. (See rule 283(h) [reimbursement orders are reviewable only under rule 300].) Respondent is entitled to reimbursement for his reasonable expenses (other than fees for attorneys and experts) because he was exonerated of all charges (1) after a trial in the hearing department and (2) after review before the review department. (Bus. & Prof. Code, § 6086.10, subd. (d); rule 283(a).)[2]

[1]All further rule references are to the Rules of Procedure of the State Bar unless otherwise indicated.

[2]All further statutory references are to the Business and Professions Code unless otherwise indicated.

In its petition, the State Bar challenges only that portion of the hearing judge's order that awards respondent reimbursement for the $1,260 that respondent paid to obtain the transcript of the trial in the hearing department. Respondent was required to obtain and pay for the trial transcript because he sought our review of the hearing judge's decision on the disciplinary charges in this matter. (Rule 301(a)(2).) According to the State Bar, the hearing judge abused his discretion and committed an error of law when he awarded respondent reimbursement for the cost of the trial transcript. (See rule 300(k) [standard of review under rule 300 is abuse of discretion or error of law].) For the reasons discussed below, we hold that the hearing judge erred as a matter of law in awarding respondent reimbursement for the cost of the trial transcript and, therefore, modify his reimbursement order to delete that award.[3]

Underlying Disciplinary Trial and Rule 301 Review

In the notice of disciplinary charges (NDC) on which this matter went to trial, the State Bar charged respondent with three counts of misconduct. After trial, the hearing judge filed a decision in October 1997 in which he found that respondent committed the misconduct that was charged in count two. In that same decision, the hearing judge found that the evidence was insufficient to prove that respondent committed the misconduct charged in counts one and three. Accordingly, he dismissed counts one and three with prejudice.

Respondent timely filed a request for review under rule 301 (plenary review)[4] and, as noted above, was required to and did obtain and pay for a transcript of the trial in the hearing department (rule 301(a)(2)). In that prior review, respondent alleged, inter alia, that the

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[3]The State Bar's February 17, 2000, request to supplement the record on review is granted.

[4]Under rule 301, we independently review the record and may adopt findings, conclusions, and recommendations at variance with those of the hearing judge. (Cal. Rules of Court, rule 951.5; rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.)

evidence was insufficient to support the hearing judge's finding that respondent committed the misconduct charged in count two of the NDC. In an unpublished opinion, we adopted the hearing judge's dismissals of counts one and three with prejudice, but reversed his finding that respondent committed the misconduct charged in count two because we concluded that the evidence was insufficient to support it. Accordingly, we dismissed count two with prejudice. After we adopted the hearing judge's dismissals of counts one and three and then independently dismissed count two, respondent was exonerated of all of the charges. Our prior opinion in this matter is now final.

Respondent's Motion for Reimbursement

After respondent was exonerated of all charges, he filed, in the hearing department, a motion for reimbursement from the State Bar for the reasonable expenses, other than fees for attorneys and experts, that he incurred in preparation for trial in this matter. (Rule 283(a) & (d).) Thereafter, on December 22, 1999, the hearing judge filed an order in which he granted respondent's motion in part and denied it in part.

In his order, the hearing judge found that respondent was entitled to reimbursable expenses totaling $2,569.50. Included in the expenses totaling $2,569.50 is a $1,260 expense that respondent incurred to obtain the transcript of the trial in the hearing department so that he could seek our review. As we noted above, the State Bar challenges only that portion of the hearing judge's order that awards respondent reimbursement for the $1,260 cost of the trial transcript.

In support of its position, the State Bar argues that, when the hearing judge awarded respondent reimbursement for the cost of the trial transcript, he violated an alleged legislative "mandate" proscribing reimbursement awards for transcript costs to exonerated attorneys and acted in excess of his statutory authority for making cost reimbursement awards to exonerated attorneys (§ 6086.10, subd. (d)). The State Bar further argues that the hearing

judge's reimbursement award to respondent for transcript costs is inconsistent with the plain language of the rule of procedure governing cost reimbursements to exonerated attorneys (rule 283). Finally, the State Bar argues that the facts (1) that many states do not allow exonerated attorneys to recover costs (or expenses) and (2) that the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement contain a provision providing for state bars to recover their costs from disciplined attorneys, but do not contain a provision providing for exonerated attorneys to recover their costs from the state bars support its contention that the hearing judge abused his discretion and committed an error of law when he awarded respondent reimbursement for transcript costs. Because we agree with the State Bar's argument that the hearing judge's reimbursement award to respondent for transcript costs is inconsistent with the plain language of the rule of procedure governing cost reimbursements to exonerated attorneys, we need not and do not address any of its other arguments.

Discussion

The issue before us is one of first impression under our State Bar Rules of Procedure. We begin our discussion by noting "'that the right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party.' [Citations.]" (*Davis v. KGO-TV., Inc.* (1998) 17 Cal.4th 436, 439.) Moreover, a court has no discretion to award costs that are not statutorily authorized. (*Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948, citing *Davis v. KGO-TV., Inc., supra*, 17 Cal.4th at p. 442.) Finally, such cost statutes are to be strictly construed. (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 289.)[5]

[5]Our statements regarding the necessity of statutory authorization for awarding and recovering costs must be read in light of the well established principles that the State Bar is a sui generis arm of the Supreme Court (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301) and that the Supreme Court retains its inherent and original jurisdiction over attorney disciplinary proceedings (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336,

The statutory authorization for the recovery of costs in State Bar Court proceedings is set forth in section 6086.10. The Legislature added section 6086.10 to the Business and Professions Code in 1986. Before that time, costs were not recoverable by either party in State Bar Court proceedings. The authorization for respondent attorneys to recover costs from the State Bar is contained in subdivision (d) of section 6086.10.

Subdivision (d) of section 6086.10 provides that "[i]n the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State Bar in an amount determined by the State Bar to be the reasonable expenses, other than fees for attorneys or experts, of preparation for the hearing." Other than expressly excluding fees for attorneys and experts, the statute does not define "reasonable expenses" or prescribe the method by which the State Bar is to determine what they are. Accordingly, the State Bar's Board of Governors (hereafter Board of Governors) properly exercised its statutory rulemaking authority (§§ 6086, 6086.5) and adopted rule 283 to define "reasonable expenses" and to provide the procedure by which exonerated attorneys may seek reimbursement from the State Bar for those expenses. (Cf. *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 277 [State Bar appropriately exercised its rulemaking authority to develop a formulaic method of determining and calculating costs to be imposed on disciplined attorneys under section 6068.10, subdivision (b), instead of making complicated individualized cost assessments based on actual expenses].)

In rule 283(b), the Board of Governors set forth an exclusive list of nine categories that are allowable expenses (or costs) of preparation for trial for which exonerated attorneys may obtain reimbursement from the State Bar under section 6086.10, subdivision (d).

338-339; accord § 6075). In light of those principles, the Supreme Court might well adopt rules providing for and regulating the awarding and recovery of costs in State Bar Court proceedings. However, it has not done so. Therefore, we confine our discussion only to the statutory authority.

Accordingly, and in the absence of Supreme Court authority to the contrary, the State Bar Court may award an exonerated attorney reimbursement from the State Bar for an expense only if the expense falls within one of the nine allowable categories set forth in rule 283(b). (See, generally, § 6086.5 [State Bar Court's jurisdiction may be limited by rules adopted by the Board of Governors].) And, even then, the State Bar Court may award the attorney reimbursement only to the extent that the allowable expense is reasonable.

In the present matter, the hearing judge found that the $1,260 expense respondent incurred to obtain the trial transcript is an allowable expense under rule 283(b)(5). Rule 283(b)(5) provides that an exonerated attorney's expense in obtaining "[t]ranscripts of Court proceedings ordered by the Court" is an allowable expense that is subject to reimbursement under section 6086.10, subdivision (d). (Emphasis added.)

In his order, the hearing judge correctly acknowledged that "the trial transcript was not technically 'ordered' by either the Review Department or the Hearing Department." Nonetheless, the hearing judge found as follows: "that the necessity of the trial transcript in order for Respondent to pursue review in this matter compels the conclusion that the transcript was required by the court. In this context, whether the transcript was required or ordered is essentially synonymous. The court therefore finds that Respondent is therefore entitled to reimbursement of the costs of the trial transcript in this proceeding."

We conclude that the hearing judge's finding that respondent's necessity of the trial transcript for the plenary review in this matter is synonymous with the court ordering the transcript is inconsistent with rule 283(b)(5). Accordingly, because the trial transcript was not ordered by the court, we reverse the hearing judge's reimbursement award of $1,260 for the cost of the transcript.

"It is clear rules of procedure adopted by the Board of Governors are not legislative acts. However, we deem it appropriate to apply the rules for statutory interpretation to such

rules." (*In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 97, fn. 5.) The first fundamental rule of statutory interpretation is to examine the language of the statute. (*Id.* at p. 97, citing *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239; see also *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) If the meaning is clear, then the language controls and no further analysis is necessary. (*In the Matter of Sheppard, supra*, 4 Cal. State Bar Ct. Rptr. at p. 97.) We hold that the meaning of the participle phrase "ordered by the court" in rule 283(b)(5) is clear and unambiguous. Under the clear meaning of that rule, an exonerated attorney may obtain a reimbursement award for his or her expense in obtaining transcripts of court proceedings only if the court orders that the transcripts be prepared.[6]

Even though respondent could not have obtained plenary review of the hearing judge's October 1997 decision without first obtaining and paying for the trial transcript as the hearing judge pointed out in his order, the requirement of obtaining the transcript is not imposed by the court; it is imposed by rule 301(a)(2) -- which, like all the Rules of Procedure of the State Bar, was promulgated and adopted by the Board of Governors. And, under that rule, it is clear that it is the party seeking review that "orders" the transcript of the trial and not the court, which is consistent with our construction of rule 283(b)(5).

Furthermore, our construction of rule 283(b)(5) is consistent with the construction of similar language that was contained in former section 274 of the Code of Civil Procedure[7] by the court in *Peoples Ditch Co. v. Foothill Irr. Dist*. (1932) 123 Cal.App. 257, 259-260. Former section 274 provided as follows: "In civil cases, the fees for reporting and for

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[6] The term "Court" in the State Bar's Rules of Procedure refers to: "the State Bar Court, Hearing Department, Review Department, or any judge thereof." (Rule 2.32.)

[7] The provisions of former section 274 were transferred to Government Code section 69953 until it was amended by Statutes 1986, chapter 823, section 3. The relevant civil transcript cost recovery statute is now Code of Civil Procedure section 1033.5, subdivisions (a)(9) and (b)(5).

transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and in either case all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case." After adding emphasis to the phrase "ordered by the court" in former section 274, the court in *Peoples Ditch* held that "[f]rom the above-quoted language of [former section 274] it is clear that it is a condition precedent to the inclusion in an award of costs of the fees of the court reporter for the preparation of a transcript that the court shall have ordered it to be prepared. [Citations.]" (*Peoples Ditch Co. v. Foothill Irr. Dist., supra*, 123 Cal.App. at p. 260; accord *Walton v. Bank of California* (1963) 218 Cal.App.2d 527, 547-548 [construing nearly identical language that was found in Government Code section 69953 (the "successor" to former section 274) before section 69953 was amended by Stats. 1986, c. 823, § 3].)

Finally, arguments similar to the conclusions of the hearing judge were rejected by the court in *Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946. In that case, plaintiff Sanchez (and her children) obtained a medical malpractice judgment against defendant Bay Shores Medical Group and others. Accordingly, plaintiff Sanchez was entitled to recover her costs from defendants. (Code Civ. Proc., § 1032, subd. (b).) Sanchez argued that she was entitled to recover the cost of expert witnesses under Code of Civil Procedure section 1033.5, subdivision (a)(8), which provides that the "[f]ees of expert witnesses ordered by the court" are allowable costs. As the court in *Sanchez* stated, "Sanchez argues that medical experts are necessary in medical malpractice actions in order for a plaintiff to meet its burden of proof as to the standard of care and breach of the standard of care elements. Thus, Sanchez asserts medical experts in medical malpractice actions have effectively been ordered by the court. This is incorrect. The fact that an expert is necessary to present a party's case does not mean that expert has been ordered by the court for purposes of recovery of expert witness fees as costs. [Citation.]" (75 Cal.App.4th at p. 950.)

SUMMARY

In our view, awarding respondent reimbursement for the cost of the trial transcript is fair. This is particularly true in light of the fact that, in every case in which discipline of a public reproval or greater is imposed on the attorney, the State Bar is awarded reimbursement for the cost of a trial transcript not ordered by the court, but acquired solely for the purpose of obtaining review of the hearing judge's decision (§ 6086.10, subd. (b); rule 280). Thus, we invite the Board of Governors to consider providing for, or seeking legislative or Supreme Court authorization for, reimbursement awards to exonerated attorneys for the costs of trial transcripts acquired solely for the purpose of obtaining review of hearing judges' decisions.

But under the current law, the hearing judge erred as a matter of law by awarding respondent $1,260 as reimbursement for the cost of the trial transcript. Accordingly, we hereby modify the hearing judge's December 22, 1999, order to delete the $1,260 reimbursement award to respondent for the cost of the trial transcript.

WATAI, J.

We concur:

OBRIEN, P. J.
STOVITZ, J.

Case No. 95-O-16652

In the Matter of Kuojen Felix Wu

Hearing Judge

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